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SUPREME COURT OF THE UNITED STATES.

October Term, 1949. No. 734.

NATHAN R. ALLTMONT and CHARLES O'NEILL,
Petitioners,

v.

UNITED STATES OF AMERICA, UNITED STATES MARITIME COMMISSION,
Respondents.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF ON BEHALF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS (READING COMPANY, PENNSYLVANIA R. R. LINES EAST, HUDSON & MANHATTAN R. R. CO. AND LONG ISLAND R. R.), ORDER OF RAILWAY CONDUCTORS (PENNSYLVANIA R. R. LINES EAST) AND RAILWAY EMPLOYEES' DEPARTMENT, A. F. OF L.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of the Brotherhood of Locomotive Engineers (Reading Company, Pennsylvania R. R. Lines East, Hudson & Manhattan R. R. Co. and Long Island R. R.), the Order of Railway Conductors (Pennsylvania R. R. Lines

East) and the Railway Employees' Department, A. F. of L., respectfully represents:

These unions have filed this petition for leave to intervene in these proceedings because of the extreme importance and frequency of incidence of the issues raised in this case. Inasmuch as thousands of railroad workers are injured annually and suits are instituted in the United States District Courts under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., and under the various Safety Appliance Laws, 45 U. S. C. A., Sections 1-16 and 23, inclusive, the problem of preparing such cases for trial is ever present.

The Federal Rules of Civil Procedure pertaining to discovery admittedly were written with a view toward eliminating the adversary system. There were directed toward facilitating and assuring the ascertainment of all facts pertaining to each case, so that causes of action would be decided not upon mere superiority of opportunity to investigate the factual situation, but upon all of the facts, by whomever they might have been developed.

In that manner it was hoped that each case would be fairly and squarely tried upon all of the proper and relevant evidence known to all of the parties in advance of trial, thereby eliminating all elements of surprise in the actual trial of the case.

The Congress of the United States committed unto this Court the responsibility for the development of rules of practice and procedure which would provide the greatest assurance of the true administration of justice in the courts of the United States, 28 U. S. C. A., Sections 2071, 2072. Justice is best obtained where there is complete revelation of all the facts and circumstances relating to an occurrence or incident, without regard to where the chips may fall. Complete revelation can be obtained only if all facts that anyone has learned by any means, regarding a given occurrence, are made available for hearing by the court and jury, or by any other determining body, limited only by the rules

of evidence on relevancy, competency or privilege ("work product" of trial counsel).

Until the decision in the instant case, the district courts within the Third Circuit had adhered to the principle that justice is best obtained by making all of the parties disgorge whatever information had been gleaned, from whatever source, and that all other persons having information should be obliged to do likewise. This includes statements taken by the operating and/or claim departments of the defendants and of the parties themselves, whether plaintiff or defendant. That principle was laid down in *Nedimyer v. Pennsylvania R. Co.*, 6F. R. D. 21 (1946) before the decision in *Hickman v. Taylor*, 329 U. S. 495 (1946), and again in *DeBruce v. Pennsylvania R. Co.*, 6F. R. D. 403 (1947)* (after the decision in the *Hickman* case, supra,) and that principle has been followed without exception or dilution up to the present time.

American industry today is not the product of individuals working alone, but rather of thousands of men working together, be it in a factory, on a railroad, at sea, or in a large business organization. Ordinarily, one man is not and can not be familiar with all of the facts leading up to an incident, an occurrence, or indeed a catastrophe, that results in the serious maiming of a husband or a father, or indeed in the loss of life of such a breadwinner. The incipience of the tragedy may have been many months before, hundreds of miles away.

The Congress of the United States, in cases under the

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* Before the **DeBruce** case was decided, Judge Kirkpatrick called a conference of practically all of the local lawyers active in cases under the Federal Employers' Liability Act and the Jones Act. At that round table conference, he had this to say, in almost these words: "For many years prior to ascending the bench, I represented many of the insurance casualty companies, the railroads and interurban lines in the city of Easton, Pennsylvania. Much too often did I return to my office with the unhappy feeling that I had obtained a non-suit, a verdict for the defendant or an n. o. v. in cases where, had the plaintiff been able to get the information that was lodged in the defendant's file, some poor widow or maimed plaintiff would have had a different result. So long as I am on the bench, I shall interpret these rules in this court to prevent the recurrence of such injustice."

Jones Act, 46 U. S. C. A., Sec. 688, and under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., has laid down a requirement of negligence as a basis for recovery. Men working alone, at sea on a vessel at night, or out in railroad yards at night, are later found dead, with no means available to the bereaved families for ascertaining the circumstances which might establish liability under these statutes, other than by utilization of the rules of discovery promulgated by this Court.

This Court is not unaware of the practical aspects of the preparation of a case for presentation and trial before a court and jury. It is the investigation, the discovery of facts, the identity and locating of witnesses, that develops liability; but without these tools of discovery, counsel may be the most learned in law and yet find himself helpless to prepare his case. Members of the working crew may have separated and spread all over the country or indeed the world; the defect in the equipment may have been corrected, repaired or removed; the cause of the accident may have been a physical fact to which counsel may have no clue nor any reason to suspect. The employer, however, has all this information. It has been developed by the employer's superiority of opportunity to obtain facts. These facts have usually been reduced to writing in statements taken from employees—statements taken because the very operation of the railroad or vessel requires it. They may have been taken for accounting, replacement or engineering purposes, let alone for the preparation of a defense in the prospective law suit.

Illustrative of this, may we give the Court a practical situation. In *Sweeting v. Pennsylvania R. Co.*, 142 F. 2d 611 (1944), the widow of a hostler who was found in flames on the ground alongside his electric locomotive, near a roundhouse, retained counsel a few months before the running of the statute of limitations. She was utterly unaware of any of the facts leading up to the accident. There were no eye-witnesses. The case was seemingly hopeless from

the viewpoint of the widow. She was to be left penniless, with a child of nine. Such facts as were conceded by the employer pointed only to the decedent's own conduct as the sole cause of the accident. Finally, copies of statements were obtained. In the statement of one anguished fellow employee was the comment: "If he had to die, why did he have to get two shots?" This apparently unconnected, meaningless phrase, discovered only because it was in the written statement made to the operating department, developed later into proof that without proper investigation as to the cause of a short circuit in the area where the electric locomotive was known to be, the power director had restored the current, thereby causing the flames from which the decedent died. Here indeed was a ground of liability the existence of which no lawyer, however ingenious, could by any stretch of the imagination have suspected, had he not had such a lead as was found in that statement, obtained under the federal discovery rules.

Is this avenue of discovery (indeed the most important available to the injured employee) to be taken away from him by legalistic, conceptualistic reasoning and interpretation of rules, which would mean that this court had not intended at all to provide discovery in the true sense of the word? The opinion of the court below would operate to reduce to rivulets what had been the teeming rivers of information that flowed from the heretofore existing law in this Circuit following the opinion of Judge Kirkpatrick in *DeBruce v. Pennsylvania R. Co., supra.*

Complete justice was being administered in these courts. It did not always mean that plaintiff would win (see *Eckenrode v. Pennsylvania R. Co.,* 335 U. S. 329 (1948), but it meant that he would win when he was entitled to win. His assurance of recovery, as provided by these two great statutes (the Jones Act and the Federal Employers' Liability Act) should not be given with one hand by Congress and taken away with the other, by the courts, through narrow, ritualistic concepts of legal procedure and practice.

Moreover, we now see looming before us an insuperable obstacle in the phrase "good cause," proof of which is necessary under Rule 34 before statements can be obtained. The quantitative and qualitative meaning of "good cause" will be subject to the whim, attitude and disposition of a particular judge on the particular day when the motion under Rule 34 is presented.

Legislation such as the Federal Employers' Liability Act and the Jones Act, conceived in a benign atmosphere, and heretofore supposedly invigorated by a liberal interpretation of the federal rules of discovery, must not be permitted to be withered by the wintry approach of the court below—an approach which would permit technical peccadilloes and whimsicalities to prevent truth from emerging supreme.

Either the court below was gravely in error in its interpretation of Rules 26 and 33, or this court has failed to provide a fully developed system of discovery to implement the administration of justice. We believe this court intended to provide absolute, total discovery; that it will carefully scrutinize, review and reverse any decision that tends directly or indirectly towards retrogression instead of progress in this interest.

It is respectfully suggested that this court must seize this opportunity to challenge the decision below, as it may never again have an opportunity to review this question, since decisions on the rules are of an interlocutory nature. American workingmen throughout this nation must be given this protection, and this court must be ever vigilant to the end that legislation intended to provide compensation for injury or death shall not have its remedial objectives emasculated by procedural stricture.

We of railroad labor are very happy indeed with the Federal Employers' Liability Act and its interpretation by this court since the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54 (1942). The federal rules of discovery as heretofore interpreted have made this statute the *satis-*

factory and *adequate* remedy it has proven to be since the amendments of 1939.

Respectfully submitted,

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